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In this chapter. . .

This chapter contains a brief discussion of the appeal of orders entered in all of the types of proceedings discussed in this benchbook. It also includes a discussion of applicable standards of review. This chapter does not contain discussion of appellate procedure.

For discussion of review of a referee’s recommended findings and conclusions, see Chapter 12. Rehearings are discussed in Section 9.15.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJJ, 1998).

*See also Section 24.4, below, for the rules applicable to appeals in minor PPO proceedings.

24.1 Court Rules Governing Appeals From Family Division

Except as modified by MCR 3.993, Chapter 7 of the Michigan Court Rules governs appeals from the Family Division. MCR 3.993(C)(1). Subchapter 7.200 governs appeals to the Court of Appeals, and Subchapter 7.300 governs appeals to the Supreme Court. Discussion of these rules is beyond the scope of this benchbook.*

24.2 Appeals by Right From Family Division Orders

MCR 3.993(A) lists the Family Division orders that may be appealed by right. That rule states as follows:

“(A) The following orders are appealable to the Court of Appeals by right:

- (1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,
- (2) an order terminating parental rights,
- (3) any order required by law to be appealed to the Court of Appeals, and
- (4) any final order.”

For orders entered prior to January 1, 1998, see MCL 600.861(c). See MCR 7.202(7)(a)–(b) for a definition of “final judgment” or “final order” in civil and criminal cases.

In *In re EP*, 234 Mich App 582 (1999), overruled on other grounds 462 Mich 341, 353 (2000), the trial court entered a disposition order in a child protective proceeding removing the child from his home. The child subsequently returned home for an “extended visit.” After the child was returned to foster care following an accelerated dispositional review hearing, the respondent parent appealed. The Court of Appeals held that respondent had an appeal by right under MCR 3.993(A)(1) because “the child was physically residing in respondent’s home at the time the juvenile court entered the supplemental dispositional order removing the child from the extended home visit.” *EP*, *supra* at 591.

There is no requirement in the court rules governing delinquency and minor PPO proceedings that the court advise the juvenile of the right to appeal following an order of disposition placing a minor under the supervision of the court or removing the juvenile from the home. Compare MCR 3.950(E)(1)(c)(i)–(iii), which requires the court following a “traditional waiver” proceeding to advise the juvenile of the rights to appeal a decision to waive jurisdiction and to appointed appellate counsel.

*See Chapter 13 (probation violations in delinquency cases).

Orders revoking juvenile probation. Because it is an order removing the juvenile from his or her home, a juvenile may appeal as of right to the Court of Appeals an order by the Family Division revoking juvenile probation and committing the juvenile to an institution or agency. See MCR 3.993(A)(1). However, if the juvenile did not appeal the initial disposition, errors in the initial proceeding may not be raised on appeal of the probation revocation. *In re Madison*, 142 Mich App 216, 219–20 (1985), citing *People v Pickett*, 391 Mich 305, 316 (1974).*

MCL 600.1041 deals with suspension of a Family Division order pending appeal and sets forth a time for delayed appeals:

“The pendency of an appeal from the family division of circuit court in a matter involving the disposition of a juvenile or, in a case where the family division has ancillary jurisdiction, from an order entered pursuant to the mental health code . . . shall not suspend the order unless the court to which the appeal is taken specifically orders the suspension. An application for a delayed appeal from an order of the family division of circuit court in a matter involving the disposition of a juvenile shall be filed within 6 months after entry of the order.”

24.3 Appeals by Leave From Family Division Orders

All orders not listed in MCR 3.993(A) are appealable to the Court of Appeals by leave, including interlocutory appeals. MCR 3.993(B).

24.4 Appeals in Minor Personal Protection Order (PPO) Proceedings

MCR 3.709 provides:

“(A) Rules Applicable. Except as provided by this rule, appeals must comply with subchapter 7.200. Appeals involving minor personal protection actions under the Juvenile Code must additionally comply with MCR 3.993.

“(B) From Entry of Personal Protection Order.

“(1) Either party has an appeal of right from

(a) an order granting or denying a personal protection order after a hearing under subrule 3.705(B)(6), or

*Appeals from involuntary dismissals are by leave granted.

(b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.

“(2) Appeals of all other orders are by leave to appeal.*

“(C) From Finding After Violation Hearing.

“(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.

“(2) All other appeals concerning violation proceedings are by application for leave.”

24.5 Appeals in Designated Case Proceedings

Designated case proceedings are criminal proceedings that occur within the Family Division of the Circuit Court. Conviction has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7). Criminal defendants have an appeal by right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere shall be by application for leave to appeal. Const 1963, art 1, § 20 and MCL 770.3(1).

Following conviction, if the court enters an order of disposition instead of imposing sentence or delaying imposition of sentence, the juvenile may appeal by right under MCR 3.993(A)(1).

24.6 Appeals in “Traditional Waiver” Proceedings

Juveniles subject to “traditional waiver” proceedings have an appeal by right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere shall be by application for leave to appeal. Const 1963, art 1, § 20 and MCL 770.3(1).

A juvenile may appeal by right to the Court of Appeals an order granting the prosecutor's motion to waive jurisdiction following “traditional waiver” proceedings. See MCR 3.950(E)(1)(c)(ii).

24.7 Appeals in “Automatic Waiver” Proceedings

Juveniles subject to “automatic waiver” proceedings have an appeal as of right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere shall be by application for leave to appeal. Const 1963, art 1, § 20 and MCL 770.3(1). A juvenile may

also appeal by right to the Court of Appeals from the imposition of a sentence of incarceration after a finding that the juvenile violated probation. MCR 6.933(D).

24.8 Standards of Review

A. Delinquency Proceedings

Orders of disposition are reviewed for an abuse of discretion. *In re Scruggs*, 134 Mich App 617, 621–22 (1984), and *In re Ricks*, 167 Mich App 285, 295 (1984).

To facilitate meaningful appellate review, the court must articulate reasons on the record for the disposition imposed. *In re Chapel*, 134 Mich App 308, 315 (1984), relying on *People v Coles*, 417 Mich 523 (1983).

B. Designated Case Proceedings

There have been no published appellate decisions establishing standards of review for the decision to designate the case for criminal trial in the Family Division, or the decision to impose a juvenile disposition or adult sentence under MCL 712A.18(1)(n) following conviction in designated cases. See, however, *In re Petty*, unpublished opinion per curiam of the Court of Appeals, decided April 26, 2002 (Docket No. 219348), lv gtd ___ Mich ___ (2002), which applies the standards set forth in *People v Thenghkam*, 240 Mich App 29 (2000). Those standards are set forth below in Section 24.8(D).

C. “Traditional Waiver” Proceedings

Where the prosecuting attorney appeals, denial of a motion to waive jurisdiction is reviewed under a bifurcated standard. Factual findings are reviewed for clear error, while the decision to waive or retain jurisdiction is subject to an abuse of discretion standard. *In re Fultz*, 211 Mich App 299, 305–06 (1995), rev’d on other grounds 453 Mich 937 (1996).

Where the juvenile appeals, an order granting a motion to waive jurisdiction will be affirmed where the court’s findings, based on substantial evidence and thorough investigation, show either that the juvenile is not amenable to treatment or that, despite his potential for treatment, the nature of the juvenile’s difficulty is likely to render the juvenile dangerous to the public if released at age 19 or 21, or to disrupt the rehabilitation of other children in the program. *People v Dunbar*, 423 Mich 380, 387 (1985).

*See Section 16.19 for a list of the current criteria for second-phase hearings.

Note: The standards of review established in *Dunbar* are based upon the criteria for second-phase hearings that were in place prior to the 1996 amendment of MCL 712A.4. See 1996 PA 262 and *People v Whitfield (After Remand)*, 228 Mich App 659 (1998). Because the criteria in the amended statute place emphasis on the seriousness of the offense rather than the juvenile’s amenability to treatment, it is likely that the *Dunbar* standards of review will be changed by the Court of Appeals to conform to the new statutory requirements.* The Court of Appeals may choose to use the more general standard established in *Fultz* for appeals by both prosecutors and juveniles.

D. “Automatic Waiver” Proceedings

The standard for appellate review of a circuit court’s decision to sentence a juvenile as an adult or to place the juvenile on probation and commit the juvenile to the Family Independence Agency is set forth in *People v Thenghkam*, 240 Mich App 29, 41–42 (2000):

“This court employs a bifurcated procedure to review a trial court’s decision to sentence a minor as a juvenile or as an adult. First, we review the trial court’s factual findings supporting its determination regarding each statutory factor for clear error. *People v Launsbury*, 217 Mich. App. 358, 362 . . . (1996). This first part of the inquiry focuses on whether the court made a required finding of fact and whether the record supports that relevant finding; the absence of a required finding of fact or a factual finding without support in the record constitutes clear error. See generally *People v Faucett*, 442 Mich. 153, 170 . . . (1993); *Bivins v Bivins*, 146 Mich. App. 223, 234 . . . (1985). Second, we review the ultimate decision whether to sentence the minor as a juvenile or as an adult for an abuse of discretion. *Launsbury*, *supra* at 362. This second part of the analysis scrutinizes how the court weighed its factual findings to come to the ultimate sentencing decision. See *People v Perry*, 218 Mich. App. 520, 542 . . . (1996), *aff’d* on other grounds 460 Mich 55 . . . (1999).

In *Thenghkam*, *supra* at 43–50, the Court of Appeals explored in detail these two standards before applying them to the sentencing court’s decision to commit the juvenile as a public ward rather than impose sentence. The Court of Appeals relied on *United States v United States Gypsum Co*, 333 US 364, 395 (1948), as the source of the “clearly erroneous” standard of review:

“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed.” *Thenghkam, supra* at 44.

Moreover, a trial court’s findings of fact may be “clearly erroneous” where those findings “do not accurately portray the factual background of the case.” *Id.* at 46. See also *People v Lyons (On Remand)*, 203 Mich App 465, 470–74 (1994). With regard to the “abuse of discretion” standard of review, the *Thenghkam* Court emphasized that the court must weigh its factual findings on all of the statutory factors in a meaningful way when making the ultimate decision to commit the juvenile to public wardship or impose sentence. *Thenghkam, supra* at 47–48. The court must “point to the requisite facts to justify its decision.” *Id.* at 48.

The “proportionality standard” established in *People v Milbourn*, 435 Mich 630 (1990) for reviewing sentence length must not be considered when deciding whether to commit a juvenile to public wardship or impose sentence. See *Thenghkam, supra* at 49, n 21.

The Court of Appeals may not consider post-juvenile sentencing hearing reports (updated service plans and psychiatric reports) when reviewing the sentencing court’s decision to commit a juvenile to public wardship or impose sentence. *People v Lyons (On Remand)*, 203 Mich App 465, 469–70 (1994).

E. Applicability of the “Harmless Error Test”

The “harmless error” test applies to corrections of error in both juvenile delinquency and criminal proceedings. MCR 3.902(A), MCR 2.613(A), and MCL 769.26.

24.9 Prosecuting Attorney’s Right to Appeal

In criminal cases. The scope of the prosecuting attorney’s right of appeal in criminal cases is explained in MCL 770.12. A prosecutor has no right to appeal outside the express provisions of that statute. *People v Cooke*, 419 Mich 420, 426 (1984). MCL 770.12 authorizes prosecutorial appeal from orders as long as the prohibition against double jeopardy is not violated.

The prosecuting attorney may appeal by right a decision to place a juvenile on probation and commit him or her to public wardship in “automatic waiver” proceedings. *People v Brown*, 205 Mich App 503, 504 (1994).

It does not appear that the prosecuting attorney has an appeal *by right* when the court denies the motion to waive jurisdiction. Because there is no statute or court rule providing an appeal by right, the order denying the prosecutor’s motion is not required by law to be appealed to the Court of Appeals pursuant to MCR 3.993(A)(3). In addition, the order is not a final order of

the Family Division appealable by right pursuant to MCR 3.993(A)(4). See also *In re Fultz*, 211 Mich App 299, 301 (1995), rev'd on other grounds 453 Mich 937 (1996) (following affirmance by the circuit court, the prosecutor appealed to the Court of Appeals by leave granted the probate court's dismissal of the charges against defendant).

In delinquency cases. As petitioner in a delinquency case, the prosecuting attorney is a party to the proceeding. MCR 3.903(A)(18)(a). As a party, the prosecuting attorney may appeal to the Court of Appeals by right from the Family Division any of the following orders:

“(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,

“(2) an order terminating parental rights,

“(3) any order required by law to be appealed to the Court of Appeals, and

“(4) any final order.” MCR 3.993(A)(1)–(4).

However, as in criminal cases, the prosecuting attorney may not appeal a “not guilty” verdict in a delinquency case. See 1988 Staff Comment following MCR 3.993, which states that the petitioner does not have the right to request a review of findings and orders issued after jeopardy has attached in a delinquency proceeding. Jeopardy attaches when a juvenile court assumes jurisdiction over a juvenile as a delinquent. *Breed v Jones*, 421 US 519, 531 (1975).

24.10 Appointment of Appellate Counsel

Delinquency cases. MCL 712A.17c(2) gives the court broad authority to appoint counsel for a juvenile in delinquency proceedings. That provision requires the court to appoint counsel for a juvenile when any of the following circumstances are present:

“(a) The child’s parent refuses or fails to appear and participate in the proceedings.

“(b) The child’s parent is the complainant or victim.

“(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.

“(d) Those responsible for the child’s support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.

“(e) The court determines that the best interests of the child or the public require appointment.”

MCR 3.915(A)(2)(a)–(e) contain substantially similar criteria for the appointment of counsel.

See also MCR 3.950(E)(1)(c)(iii), which requires the court in “traditional waiver” proceedings to notify a juvenile of the right to appointed counsel to appeal a decision to waive jurisdiction over the juvenile.

Criminal cases. Indigent criminal defendants are entitled to appointed counsel in their first appeal as of right. *Douglas v California*, 372 US 353, 355, 357 (1963). However, the right to appointed counsel does not extend to subsequent discretionary appeals in state or federal courts. *Ross v Moffitt*, 417 US 600, 610–12 (1974).

Except in limited circumstances, criminal defendants who plead guilty or nolo contendere are not entitled to appointed appellate counsel. MCL 770.3a states as follows:

“(1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant’s conviction or sentence.

“(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:

- (a) The prosecuting attorney seeks leave to appeal.
- (b) The defendant’s sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
- (c) The court of appeals or the supreme court grants the defendant’s application for leave to appeal.
- (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

“(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

- (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
- (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
- (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

“(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.”

Indigent criminal defendants do not have a federal or state constitutional right to appointed appellate counsel to assist them in filing an application for leave to appeal. *People v Bulger*, 462 Mich 495 (2000).